Supreme Court of the United States

OCTOBER TERM, 1948.

No. 405.

M. ROBERT GUGGENHEIM, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the Court of Claims.

PETITIONER'S REPLY BRIEF

To Government's Brief in Opposition to His Petition for Certiorari.

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TABLE OF CASES CITED.

OTHER AUTHORITIES.

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The Government's Brief in Opposition does not, in a direct or logical manner, answer any of the points which petitioner has made in his Petition for Writ of Certiorari and Supporting Brief. Therefore, we believe the Government, lacking a forthright answer, has sought to avoid the real issues involved in this certiorari question.

At the beginning of its argument, pp. 9, 10 of its Brief, the Government reiterates a number of prejudicial statements and ideas which we already have disproved, or which

obviously are unsound, and thereby leads into the thought that "The Government agrees" with the Court of Claims' statement which we have called the "key paragraph" of that Court's opinion and which we have demonstrated, even on the Court of Claims' own basis, to be completely and unquestionably inaccurate *as to one of the tax years involved in this case;* and to be definitely inconsistent, *as to both of our tax years,* with a Circuit Court decision, that is to say, in respect to the basis, of applying the principle of equitable estoppel, which the Sixth Circuit Court of Appeals used in its *Joyce* v. *Gentsch* (141 F. 2d 891) decision. Petition for Writ of Certiorari p. 15; Supporting Brief pp. 26, 27.

It is remarkable that the Government should cite the *Stearns* case (291 U. S. 54, 61, 62) pp. 10, 11 of its Brief in Opposition, as being one wherein this Court allegedly "rejected a contention similar to that made here"; whereas the exact opposite is true, by any fair comparison as to similarity. The *Stearns* case is just as *dis*similar as it could be—and involve roughly comparable subject-matter—in the element of chief importance to its possible application to this case. The quotation from that opinion which the Government sets forth makes this apparent, when read against the factual background of the instant case. As a matter of fact, we quoted a part of the same text, in reciting errors of law which we were alleging in our Motion for New Trial in the Court of Claims, as showing the "fundamental and unquestioned" principle that "He who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned".

The whole point here is that this petitioner *did not* "prevent" the Commissioner from making any possible further assessments which the Government might have wished to make, since he took no initiative whatever toward preparing or giving the so-called "agreement" in the waiver, or the waiver itself. And, for the same reason, the petitioner did not and could not possibly have "occasioned" any "nonperformance" on the Commissioner's part respecting

any possible further tax assessments. A cursory review of the *Stearns* opinion reveals at least nine (9) separate references to the taxpayer therein having taken the initiative toward inducing the Commissioner to take a step or forego an action of which that taxpayer later tried to take advantage. They are:

1. Reference is made therein to a claim for refund filed on a certain date wherein "the petitioner * * * asked that the unpaid balance for 1917 be set off against the claim for overpayment and that the remainder be refunded." p. 57.

2. The opinion mentions the fact that, in auditing the tax for 1918 and crediting the overassessment for that year upon the tax for the year before, the Commissioner acted "at the request of the petitioner, which was valid till revoked." p. 59.

3. Court concluded that it did not need to rule on whether the waiver, on which the taxpayer therein was depending, had been properly approved, because in that case there was "more than a waiver" (which was merely "an abandonment of a privilege to insist upon the fulfillment of a condition") since "there was a positive request, which till revoked upon reasonable notice had the effect of an estoppel." p. 59.

4. The Court noted that certain waivers were on file but that the petitioner did not rest upon them; and that "without more" they would not have "availed to avert the threatened levy." The opinion then states that on a certain date "the petitioner filed with the Commissioner a request to withhold the process of collection until credits were adjusted." pp. 59, 60.

5. The opinion mentions a certain date upon which a collector's report, of a stated amount being still unpaid upon the tax for 1917, was received by the Commissioner; and then continues to the effect that "Promptly thereafter (June 28, 1924), he had complied with the petitioner's instructions by offsetting the overpayment for the one year in reduction of the balance owing for the other." p. 60.

6. Having referred to the matter of offsetting one year's credit for tax overpaid against another year's additional tax due, the opinion continues: "The whole process had been completed within the time fixed by implication in the petitioner's request, within the time when assessment was due for the last of the group of years (1918 to 1921) to be covered by the audit." p. 60.

7. The difference between a merely tacit or inactive "approval" and an "inducement or request" is clearly suggested where the opinion refers to a statute, rendering "void" any credit made by the Commissioner "against a liability barred by limitation", and then continues by explaining that the aim of that provision was to invalidate such a credit if made by the Commissioner of his own motion without the taxpayer's approval "or with approval falling short of inducement or request." p. 60.

8. The opinion states that, "If nothing more than this appeared (i. e., more than "approval falling short of inducement or request"), then "there was to be no exercise in invitum of governmental power"; and proceeded to explain that, in determining whether liability had been barred by limitation, "it will not do to refer to the flight of time alone"; but that "The limitation may have been postponed by force of a simple waiver, which must then be made in adherence to the statutory forms, or so we now assume." The explanation continued: "It may have been postponed by deliberate persuasion to withhold official action." p. 61.

9. That, in order to be synonymous with estoppel, the action, which the taxpayer later contends was invalid, must have been taken "at the taxpayer's request", is indicated where the Court expresses the thought of it being "an unreasonable construction that would view the prohibition of the statute as overriding the doctrine of estoppel * * * and invalidating a credit made at the taxpayer's request." The opinion continues with several reiterations of the idea of the taxpayer's request for the action which the Commissioner took, proceeding thus:

"Here at the time of the request, the liability was still alive, unaffected as yet by any statutory bar. The re-

quest in its fair meaning reached forward into the future and prayed for the postponement of collection till the audits for later years had been completed in the usual course. This having been done, the suspended collection might be effected by credit or by distraint or by other methods prescribed by law. Congress surely did not mean that a credit was to be void if made by the Government in response to such a prayer." p. 61.

There followed immediately the part of the *Stearns* opinion quoted in the Government's Brief in Opposition. It now should be amply clear that the Court was basing its decision, holding estoppel in the *Stearns* case, largely on *the fact that the taxpayer therein had taken the initiative* in persuading the Commissioner to do or to refrain from doing acts, pertaining to his tax, as to which he later sought to take advantage on the basis that the Commissioner was wrong in having followed his, the taxpayer's, "prayer". There are other important differences between the *Stearns* case and the instant situation; but they do not seem to be of sufficiently direct pertinence to the point above reviewed to justify recounting them here.

The Government's Brief in Opposition, p. 11, cites three other cases as being in "Accord", supposedly meaning that they are in accord with the quotation which has just been given from the *Stearns* case. Perhaps they are in "accord" with what this Court *really said* in the *Stearns* case, and what it *really meant*, which of course are the same thing. But they are not in accord with the obvious purpose for which the Government cited and quoted from the *Stearns* case, that is to say, its rather ill-advised attempt to present that decision as an authority justifying application of the principle of estoppel against the taxpayer, as the Government is seeking to do in the instant case. A brief analysis of those three "Accord" cases seems called for here:

Dickerson v. *Colgrove*, 100 U. S. 578:

This opinion makes a general statement of the principle of "equitable estoppel or estoppel *in pais*", similar in sub-

stance to that quoted from the *Stearns* case in the Government's Opposition Brief herein, pp. 10, 11. The general statement we refer to is the same statement quoted from the *Dickerson* case in the *Ralston* decision, which we shall mention immediately following.

The most pertinent facts of the *Dickerson* case were these. Chauncey, in California, upon receipt of a letter of inquiry from Morton in Michigan, as to whether he made any claim to the premises known as the Conger farm (in which his sister had had an interest which Morton had bought), replied by a letter "wherein he disavowed, in strong terms, the intention ever to assert such a claim". p. 579. The time of adverse possession, by Morton and other defendants who had lived on the land and improved it, "lacked but a year and a month of being twenty years,—when, it is conceded the statutory bar would have been complete". p. 581.

The Court held that plaintiff, Dickerson, to whom Chauncey had conveyed by quitclaim deed, was not a bona fide purchaser; and also that he was prevented from maintaining his claim "by an estoppel *in pais*". It is clear that Chauncey, the person against whom the estoppel applied, had actively misled the person who would have been injured if the Courts had not been willing to interpose the very equitable and very necessary principle of estoppel *in pais* which, as we have shown by a citation at p. 29 of our Brief in Support of Petition for Certiorari, has "the same definition" as estoppel by misrepresentation.

Ralston Purina Co. v. *United States,* 75 Ct. Cl. 525, 58 F. 2d 1065:

This is another case in which the taxpayer would have actively misled the Commissioner to his hurt if the principle of estoppel had not been applied. In order to be relieved of the burden of having to pay a substantial additional tax for 1918, the

> "plaintiff communicated with the commissioner by telegram in which it asked that collection of the additional tax due for 1918 be withheld until the overpayment for 1919 was adjusted."

After again referring to this request by the taxpayer for an offset, the opinion continues:

> "In consideration thereof the commissioner advised the collector to take no steps to collect the deficiency until receipt of the schedule of overassessment for 1919. But for the plaintiff's telegram to the commissioner the additional tax for the fiscal year 1918 would have been collected or a distraint proceeding for the collection thereof would have been begun prior to the expiration of the limitation period of five years after the return for 1918 was filed * * *."

Botany Worsted Mills v. *United States,* 278 U. S. 282:

Both the Government and the Court of Claims seem to be grasping at a straw in trying to find authority in the *Botany Mills* case for supporting an estoppel of the taxpayer in the instant case. After citing it in support of estoppel here (Brief in Opposition p. 11), the Government remarks that it is a case in which "no ground for estoppel appeared in the record or was claimed". Wherefore, with no issue on estoppel, whatever the opinion said about that subject necessarily must have been no stronger than dictum. And then, when we recall that all the Court did was to utter an "aside" or safety remark to the effect that there might be facts in a case which would justify applying the principle of estoppel, the conclusion seems unavoidable that the *Botany Mills* case is not very strong authority for applying estoppel to any particular later case.

This use of the case by the Government in its present Brief is only slightly weaker, toward justifying estoppel in the instant case, than the Court of Claims effort to establish, by the *Botany Mills* case, the proposition (as between case A and case B) that *the degree of informality*—in the compromise, or the alleged compromise, "agreement" and

in the process of obtaining it—is what should determine its acceptability, even in the face of the lack, in both instances, of the statutory requirements. The intimation was made that the compromise in the *Botany Mills* case was quite informal (this, inferentially, being the reason why such compromise was not accepted) and that the "compromise" in the instant case was very formal (which provided the reason why it should be accepted).

The foregoing, we believe, is a definitely erroneous view of the logical basis of the Court's decision in the *Botany Mills* case. We should be pleased at the proper time to show in detail wherein this is true; but this Brief obviously is not the place to undertake any such lengthy explanation. It should suffice here to say that we see no indication that this Court meant to recognize any varying degrees of informality. There were but two situations: *first,* the formal one, i. e., having the approval of the Secretary of the Treasury, just as the law required; and *second,* the informal one, which did not have the signature of this official and therefore did not conform to the statute and therefore was ineffective. It would be an odd situation in the law if a good imitation, of a simple requirement such as the approval of a stated official (but which, nevertheless, definitely failed to meet the requirement) were permitted to get by; whereas a poor imitation (but which was no different in its lack of the thing required) was ruled inacceptable. That would be to reward the clever and to penalize the non-clever.

The Government, it seems, would like to belittle the effectiveness of the case of *Joyce* v. *Gentsch* (C. C. A., 6th Circ., 1944) 141 F. 2d 891, which we have referred to, especially at Petition for Certiorari, p. 7; and in our Brief in Support, at pp. 26, 27. If the Court agrees that that case "is typical of the cases on which petitioner relies to assert a conflict" (Brief in Opposition, p. 11), then the certiorari problem is solved at once in favor of the petitioner. The only trouble then lies in the fact that it is a rather long

opinion and requires a bit of careful reading in order to be sure of getting its full and correct significance.

The part which the Government quotes from the *Joyce* opinion has a somewhat different appearance when read in its context. It then becomes evident that such portion is giving a secondary or subordinate reason why the parties were not bound by the "waiver agreement", the first and principal reason being "a lack of authority from the Secretary of the Treasury for its execution". This element is the same as in the instant case. The way the Court's opinion leads into the portion quoted in the Government's Opposition Brief is this:

> "In the instant case, the Government was not bound by the waiver agreement; not only because of a lack of authority from the Secretary of the Treasury for its execution, but also because by its very terms * * *" [Etc., proceeding as quoted in the Government's Brief, p. 11]

The subordinate reason, which the Government now is seeking to emphasize for the parties not being bound by the "waiver agreement", does not injure this petitioner's case when the facts are analyzed. The first answer is that, if an "agreement" is ineffective because it fails to conform to a specific statutory requirement, it has no need of any further reason for being void, in order to be so held by the Courts, such as lack of "mutuality". Wherefore, it does not avail the Government any benefit even if the instant case were totally different from the *Joyce* case in the respect noted in the secondary reason given by the quotation in its Brief. The next answer to the Government's reference is that the really effective part of the footnote was *left in* the form used in the instant case; and the phrase stricken out was only an explanatory appendage, the basic meaning being just the same by reason of the categorical statement which remained.

The basic part of the sentence, *which was not stricken out*, was where, after a previous sentence in the foot-note had referred to "this waiver", the statement continued with the sentence in question thus: "It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code * * *". Here follows the interpretative phrase which was stricken out, thus: "* * * *and does not, therefore,* preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due * * *". (Emphasis supplied) Since, as the *remaining* sentence says, the waiver is not "a final closing agreement under section 3760 of the Internal Revenue Code", "The right to assess a further deficiency" still remained, even though it might not have been quite so "expressly" reserved. The same thought was once expressed; but, instead of the language doubling back and saying it again in the form of a "therefore" phrase "spelling out" the detailed meaning of what already had been said, the sentence as revised merely contained the categorical statement of the basic element.

Earlier in the *Joyce* opinion, the Court had noted that the waiver, Form 870, "was not binding upon the Government and, therefore, did not bind the taxpayer"; and then the statement immediately continued:

> "The waiver agreement was not signed, approved, or accepted by any one authorized by the Acts of Congress to bind the Government *to a tax compromise*, or *to a closing agreement*. The statutes are specific. * * *" (Emphasis supplied) (I. R. C. Secs. 3760 and 3761) p. 894.

Further along in the opinion is the statement, quoted at p. 7 of our Petition for Certiorari, to the effect that circuit courts of appeal, upon the principle of the *Botany Mills* case, have considered the consent of the Secretary of the Treasury as essential to the validity of a stipulation concerning tax liability "where such stipulation is in the nature of a compromise." p. 895. There is no doubt in the

instant case, under the Government's view, that the "agreement" was "in the nature of a compromise".

At another place in its opinion, the Court, in the *Joyce* case, stated it was true that the statute barred the Commissioner from making additional assessments, when the claims for refund there in controversy were filed; and then continued:

> "* * * but it is also true that the period of limitation within which the Commissioner could have asserted a further deficiency did not expire until March 15, 1938, *which was more than five months after the Waiver was signed;* and *there was no evidence produced at the trial, nor any averment made by the Commissioner, that there were any existing facts affording a basis for further deficiency assessment.*" (Emphasis supplied) p. 894.

In the instant case it likewise is true that there has been no evidence produced nor any actual averment by the Commissioner that there were any facts in existence affording a basis for further deficiency assessments. There have been innuendoes thrown around a number of times by the Bureau's representatives to the effect that there *might have been* a desire by the Commissioner, never defined to the slightest degree, to assess further taxes since the taxpayer had opened up the case. But such intimations or inferences are far from being sufficient to establish any real desire by the Commissioner to assess additional taxes and therefore possible damage to him if estoppel is not held to apply herein. Corpus Juris Secundum has this to say on the point:

> "Before an estoppel can be raised there must be certainty to every intent, and the facts alleged to constitute it are not to be taken by argument or inference. Nothing can be supplied by intendment. No one should be denied the right to set up the truth unless it is in plain contradiction to his former allegations or act. *If an act or admission is susceptible of two constructions, one of which is consistent with a right asserted*

> *by the party sought to be estopped, it forms no estoppel.*" (Emphasis supplied) 31 C. J. S. 282, 283, Sec. 77. Same statement at 21 C. J. 1139, Sec. 139, except that additional cases are cited in footnotes.

The Government cites a number of other cases apparently meaning to indicate that they are to the same effect as its incorrect suggestion as to the holding in the *Joyce* case. The case of *Baldwin* v. *Higgins* does not support the Government's position in this case. That decision, by the District Court of the Southern District of New York, is not officially reported but may be found at 19 A. F. T. R. 1341; or as Ct. Dec. 1302, Internal Revenue Cumulative Bulletin, 1938-1, p. 264. The Circuit Court's decision, 2nd Circuit, is reported at 100 F. 2d 405. Therein neither party questioned the existence of a compromise agreement. Both of the court decisions recognized, without question, that there was such an agreement. The District Court's opinion refers to the *Botany Mills* case but does not mention the principal reason why this Court there held the agreement not to be binding, that is, because of the lack of approval by a certain official as definitely required by statute. The District Court seems mistakenly to assume that the agreement in the *Botany Mills* case may have been held invalid because of its high degree of general informality.

So far as the District Court's opinion discloses, the taxpayer there, Mr. Baldwin, may never have attacked the settlement or compromise agreement on the ground of its not having been approved by the Secretary of the Treasury. Furthermore, there was no remedial statute involved, similar to Sec. 121 of the 1942 Revenue Act, practically inviting the taxpayer to file a refund claim in the particular type of situation presented by the case.

The case of *Rubel Corp.* v. *Rasquin,* 43 F. Supp. 111, was entirely different from the instant situation. While an "offer of settlement" was made by the taxpayer, it never was formally, nor otherwise directly, accepted by the Commissioner. The taxpayer had meanwhile filed appeals in

the Board of Tax Appeals, the controversies were there settled on stipulations, and the Board affirmed the Commissioner's findings. The taxpayer did not appeal from this final determination. Later it commenced actions in the District Court for the Eastern District of New York. These cases were dismissed on the defendant's motions. The Court recounted the two alternate methods of procedure which the law afforded to the plaintiff; remarked that it had "elected to take its controversy to the Board of Tax Appeals, a forum with full authority and jurisdiction, the determination of which could be reviewed * * *"; and later explained that:

> "Congress, having provided the plaintiff with the right to review the findings made by the Board of Tax Appeals, foreclosed its right to a second remedy after selecting one." *Rubel Corp.* v. *Rasquin,* 43 F. Supp. 111.

In the case of *Bank of New York* (*Ex. Nichols*) v. *United States* (C.C.A. 3rd Circ. 8-24-48), not yet officially reported but available at 1948 Prentice-Hall Federal Tax Service Par. 72,585, the Circuit Court reversed the District Court. The particular compromise settlement there under review was held not a bar to a suit for recovery of the tax which had been paid under that settlement agreement. No question was raised as to whether there really had been a compromise effected. The settlement or compromise offer was made in a letter of the taxpayer's own phrasing, letter of November 24, 1937, wherein it referred to "this settlement, which is submitted in the form of a compromise"; and later spoke of "this offer" being "either accepted or rejected".

The settlement agreement in that case was more favorably worded, so far as a later suit by the taxpayer to recover might be concerned, than the so-called "agreement" in the instant case. But, since the whole of the informal compromise is ineffective, not being "in accordance with the statute", it makes little difference what such informal papers say or do not say. For the basic decision of this

type of case, we never really need to get down to the detail of looking at the terms of the agreement or alleged "agreement", any more than is necessary to see whether they were approved by the prescribed officers.

The Circuit Court reversed the District Court on the principal basis—so far as the interests of our case are concerned—that the situation presented "was not a true account stated, because, as is frankly admitted, the agreement was not a final settlement." And the opinion continued: "To be that it had to be signed by the Commissioner or his designate and approved by the Secretary or Undersecretary of the Treasury in accordance with the statute." The Court then remarked that "Those necessary signatures were obtained after suit had been started, but by then it was too late."

At page 12 of its Brief in Opposition, the Government seems to be trying, quite feebly indeed, to get some aid and comfort out of the *Castell* case against the remedial statute (Sec. 121 of Rev. Act of 1942) which we have invoked as the reason for claiming, as non-business expense deductions, the tax determining items in the instant case. We find no authority in the *Castell* case to any such effect. It seems necessary, therefore, to take a brief view of what *is* held by *Castell* v. *United States,* 98 F. 2d 88.

The plaintiff therein contended that the Attorney General had no power to withdraw an appeal on terms which involved a cash settlement and that such settlement should have been made by the Commissioner with the approval of the Secretary of the Treasury. The Court held this contention invalid because the Attorney General *had* authority to abandon the appeal by reason of his control over litigation in which the United States is a party. R. S. Sec. 359 (T. 5 U. S. C. A. Sec. 309). Furthermore, Sec. 3761 of the Internal Revenue Code, in reference to tax case compromises, makes no restrictions or requirements (similar to those where the "compromise is made by the Commissioner") as to compromises by the Attorney General in "any such

case after reference to the Department of Justice for prosecution or defense''.

There was, in the *Castell* case, a real settlement effected —which also was a compromise—by the Attorney General acting for the United States. The estoppel there allowed was not contrary to any provision of law since, under the applicable statute, the Attorney General had full right to compromise such a case without approval either of the Commissioner or of the Secretary of the Treasury.

One element toward justifying estoppel was that the instrument of April 7, 1926, settling the case previously instigated (wherein judgment had been rendered against the taxpayer and the Government had appealed), contained the taxpayer's admission that the taxes in controversy were ''properly assessed and due and owing by her''; and this settlement agreement further stated that ''in consideration of the premises the plaintiff hereby forever waives any right which she may now have or which may be given to her by future legislation of any kind or character whatsoever; to make any claim against the United States or any officer, agent, or agency thereof for the refund of the sum so withheld or any part or portion thereof.''

It was stated in the opinion that the taxpayer ''was estopped to question its [the settlement's] terms'' where she had ''received and retained the fruits of the settlement''. In the instant case, the taxpayer did not receive any benefits, by way of concessions, at the closing of his tax matter following the conferences in the Bureau of Internal Revenue.

The case of *Ross* v. *United States,* 75 F. Supp. 725, is similar to some other cases in respect to the taxpayer's previous appeal to the Board of Tax Appeals precluding her from later having a determination of the same issues in the courts. One such case, which we already have reviewed herein, is *Rubel Corp.* v. *Rasquin,* 43 F. Supp. 111. Another is *The Bankers Reserve Life Co.* v. *United States,* 44 F. 2d 1000, which the Government's Brief in Opposition also

mentions. In the *Ross* case, the taxpayer ***had taken and pursued*** one of two optional but mutually exclusive routes. In the instant case, by the particular instrument here in question, the waiver, the taxpayer ***declined to take*** the first optional route; but later pursued the second. These different circumstances seem to present two opposite situations. How they can be aligned, in the Court of Claims' opinion in this case, as similar is more than we can understand.

No strength is added to the Government's position herein by the suggestion, p. 13 of its Brief, that a tax may not be recovered where a settlement has been made and, later, the statute under which the tax was assessed has been held invalid. The instant case just isn't of that type. The idea that a recovery of this sort might be thought to be easier, and then that even such a recovery is not permitted, adds no validity to the Government's position here.

Neither do the cases, which the Government cites to the point stated, aid its case here by reason of the issues on which such decisions otherwise turn. The case of *Bankers Reserve Life Co.* v. *United States,* 44 F. 2d 1000, as above classified along with the *Rubel Corp.* case, is one wherein the taxpayer, first having elected one of two alternate and mutually exclusive routes for his litigation, may not afterwards pursue the other route.

In *Wisconsin National Life Insurance Co.* v. *United States,* 42 F. 2d 316, the "closing agreement" was in due form under all the requirements of the statute and therefore it was sustained as valid. Wherefore, it seems rather to emphasize the particular defect which we are pointing out in the alleged "agreement" of the instant case. The Court there said:

> "* * * the plaintiff and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on September 27, 1927, executed an agreement in respect of the tax and interest for these years under and pursuant to the provisions of section 1106(b)

> of the revenue act of 1926, * * *" (that section having been the predecessor of Internal Revenue Code Sec. 3760).

The case of *Hord* v. *United States*, 59 F. 2d 125, was similar except that it involved a tax compromise which had been executed in due form. The Court said it was of the opinion

> "that the offer of compromise and its acceptance by the commissioner, with the approval of the Secretary of the Treasury, finally closed the case, and that plaintiff may not maintain this action to recover the additional tax * * *".

Wherefore, petitioner continues respectfully to pray that a writ of certiorari may be issued as prayed in his Petition therefor.

Respectfully submitted,

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